



**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
GN Docket No. 09-191**

NPRM Submission of the Internet Innovation Alliance

The Internet Innovation Alliance (IIA) offers this submission in response to your Notice of Proposed Rule Making (NPRM) issued on October 22, 2009. IIA is a broad-based coalition of businesses, non-profit organizations and trade associations that aims to ensure every American benefits from broadband Internet regardless of race, income or geography. IIA has long supported a comprehensive national broadband strategy to complement market efforts to achieve universal broadband availability and adoption.

In summary, the IIA believes this NPRM is an unnecessary distraction from the more significant and needed policy initiatives at this crucial time in the development of the National Broadband Plan mandated by Congress. Indeed, the Commission's recent request for an extension of time to deliver a final Plan only underscores the need for the agency to devote more – not less – attention and resources to completing a national broadband strategy.

The near-theological debate over “net neutrality” has both sides armed and hysterically predicting the end of the Internet, rather than constructively working together on policies more directly responsive to the challenges of expanding broadband access to and increasing adoption by all Americans.

I. Introduction

For the past decade America has enjoyed robust broadband investment and rapid deployment of high-speed Internet services. In roughly ten years we have gone from practically zero broadband deployment to more than 95 percent availability and 63 percent adoption, according to the FCC and Pew.¹

¹ John Horrigan, “Home Broadband Adoption 2009,” Pew Internet & American Life Project (June 2009).; see also Commission Open Meeting Presentation on the Status of the Commission's Processes for Development of a National Broadband Plan 80-81 (Sept. 29, 2009) (containing broadband deployment and adoption statistics).



Cross-platform competition continues to grow between wireline, wireless and cable offerings, with promising new technologies such as high-speed satellite-based offerings and broadband over power lines rapidly emerging. Market players invest roughly \$60 billion annually in infrastructure upgrades and expansion of footprints, with an even more significant and competitive market for online applications.² While this is a strong start, it is not enough.

Throughout this period, government efforts to support broadband deployment and adoption have been ad hoc, haphazard and inconsistent. A coherent, impactful and truly national broadband strategy that maximizes the ability of innovators and entrepreneurs to invest and invent, while addressing national priorities and market failures, if any, through focused government action has been lacking. In its wisdom, Congress finally called for such a strategy in February of 2009, and we stand close to its unveiling.

Our collective attention should be focused on the enormous responsibility and opportunity the National Broadband Plan presents. Instead, all eyes are on the Net Neutrality NPRM battle and the bluster surrounding the future of the Internet. Warring factions can neither agree on the problems requiring redress nor on the terms of the debate.

All the sound and fury is unnecessary and counterproductive. At a fundamental level, the broadband markets are working: infrastructure is being built in most areas, consumers are signing up for access, and Internet users are going where they want, when they want. Regulators have shown that they possess the tools they need to discourage bad behavior, and they are willing to use them.

We believe the vast energies and passions of government and industry leaders can be better spent supporting and improving the National Broadband Plan, the stimulus grants, the broadband mapping initiative and NPRMs on Universal Service, as well as other key policy issues.

The FCC should focus its attention on rolling out and implementing a robust broadband strategy over the next year. If during that period the FCC detects any clear and present dangers to the "free and open Internet" by broadband providers, content providers or search engine providers, it can use existing

² Robert Atkinson and Ivy Schultz, "Broadband in America," Columbia Institute for Tele-Information (November 2009).



authorities to address them or seek new regulatory powers at that time (with the added benefit of events clarifying why such additional authorities are actually needed).

II. **Proceeding with this NPRM at This Time Adds Uncertainty to an Already Challenging Investment Climate.**

While more than 90 percent of Americans can presently sign up for broadband service, too many Americans in high-cost areas remain un-served, while millions more lack sufficiently robust offerings to sustain cutting-edge but bandwidth-hungry applications. The FCC has estimated that up to \$350 billion more in infrastructure investment is needed to achieve ubiquitous and truly high-speed Internet access.

All observers agree that, notwithstanding the \$7 billion for broadband infrastructure included in the American Recovery and Reinvestment Act of 2009 (ARRA), the majority of these investments will need to come from private sources, and that ongoing private investment will be needed to maintain and upgrade broadband networks.

The good news: the cable and telecommunications sector has invested a remarkable \$161.2 billion in infrastructure development since 1996, with \$60-70 billion more added each year by ISPs and other network providers.³

It is impossible to know for sure how the regulations proposed in this NPRM would impact this private investment. On the one hand, some venture capitalists involved with funding companies who build applications at the edge of the network foresee regulations bringing greater certainty and thus larger investments.⁴ In contrast, however, the vast majority of broadband

³ See, National Cable & Telecommunications Association Industry Data, www.ncta.com/Statistics.aspx.

⁴ Allan Leinwand, "Why Startups and Web Innovation Need Net Neutrality," *BusinessWeek*, December 6, 2009.



infrastructure providers and their equipment vendors anticipate net neutrality regulations depressing capital expenditures in broadband networks.⁵

Previous “experiments” in net neutrality regulations offer marginal guidance. Less onerous conditions than those proposed here attended approval of previous mergers among companies that continued to make big investments in infrastructure, but the theory that net neutrality-related conditions led to this growth has been refuted.⁶ Moreover, when the FCC auctioned spectrum in the 700 MHz band in 2008, the C-Block frequencies encumbered by net neutrality mandates resulted in fewer bidders and, on average, 40 percent lower prices, according to then- Stifel Nicolaus analyst Blair Levin.⁷ Likewise, regulations imposed on the ARRA funding seem to have discouraged the largest and most established broadband providers, though smaller and less well-known entities were less deterred.

Concerns over the potential for the FCC’s proposed net neutrality rules to negatively impact investment have been well-documented in numerous sources. The *Washington Post*, for example, has written that “attempts to micromanage” the Internet through net neutrality regulations will “stifle further investments by ISPs.”⁸ The *Wall Street Journal* has also discussed the potential for net neutrality rules to stagnate economic growth:

The world's investors can also see the arc of overall U.S. economic policy, which is becoming less inviting to global capital. Higher taxes on capital gains and income; new entitlements that will require trillions of dollars in new U.S. borrowing; a wave of new antitrust enforcement, more telecom regulation (‘net neutrality’) and trade protection, new restrictions on energy production, easier rules for union organizing, and so much more. All of these are signals that U.S. growth is likely to be

⁵ Bret Swanson, “Net Neutrality’s Impact on Internet Innovation,” Committee on Technology and Government (November 2009).

⁶ See George Ford, Phoenix Center for Advanced Legal & Economic Public Policy Studies, “Finding the Bottom: A Review of Free Press’s Analysis of Network Neutrality and Investment” (Oct. 29, 2009).

⁷ See, “FCC Spectrum Auction Ends, Successfully,” *PC Magazine*, <http://www.pcmag.com/article2/0,2817,2277146,00.asp>

⁸ Editorial, *The FCC’s Heavy Hand*, THE WASHINGTON POST (Sept. 28, 2009).



slower than it otherwise would be, and that the returns on investing in America will be lower than they should be.⁹

Now is the wrong time to experiment with considerable new regulations. These significant concerns have the potential to adversely impact desperately-needed infrastructure investment, in addition to global investment flows and domestic economic recovery.

III. **Market Conditions Do Not Compel New Regulations at This Time, with No Imminent Threats to Consumers or Market Participants.**

IIA believes the important questions posed in this NPRM do not require federal action at this time.

The threats to the “free and open Internet” remain largely hypothetical. We are unaware of any current examples of ISPs “blocking or degrading” web sites or broadband traffic. The handful of oft-cited bad actions over the past five years – such as the failure to notify consumers of its restrictions on P2P traffic over the BitTorrent file sharing software – have quickly resulted in prompt reversals and/or seemingly effective enforcement actions.

Moreover, a lack of net neutrality rules does not appear to have slowed down dynamic innovation at the edge of the network. The proposed regulations were not in place when brilliant entrepreneurs rolled out YouTube, the iPhone, Skype, Hulu, twitter, World of Warcraft, Facebook and millions of other cutting-edge online advances. Likewise, the App Economy is alive and well with creative developers offering more than 100,000 downloadable applications for BlackBerries, iPhones and other mobile devices.

Internet innovators are hard at work on the next great leaps forward in online applications which will drive broadband adoption and address our nation’s greatest challenges in health care, energy efficiency, education and expanded economic opportunity, undeterred (if not explicitly encouraged) by minimal Internet regulation.

⁹ *The Dollar Adrift*, The Wall Street Journal, Oct. 9, 2009, at A18.



Experts on the digital divide have not cited “lack of net neutrality regulations” as either a cause or a cure for race or income-based differences in broadband adoption. Nor did former Pew researcher John Horrigan find any non-users of broadband citing concerns over the future of the free and open Internet as the basis for their failure to buy broadband. A ground-breaking December 2009 poll of 700 African Americans and 200 Latinos conducted by former Obama Campaign pollster Cornell Belcher found that the main reasons that non-Internet users in communities of color remain off-line are (1) they do not see the need/value, (2) they lack computers or smart phones and (3) they lack the digital literacy and online confidence. Others cite insufficient speed of connection and affordability of broadband.¹⁰ We understand how to remedy all of these challenges, none of which would be solved or even addressed by this NPRM.

The FCC must remain poised to act if and when Internet companies abuse market power or mislead consumers. We tend to agree with the *Washington Post*, that “[t]ransparency should go a long way toward allaying the concerns of those who fear ISP manipulation of markets,” and we believe the Commission can demand and receive greater transparency (which is a very worthy policy objective) without adopting net neutrality rules at this time.

IV. The Risk of Unintended Consequences Counsels Caution

IIA joins the President and Chairman Genachowski in supporting a free and open Internet, but we believe the agency’s proposed rules are the wrong way to achieve it.

By explicit design, the rules proposed in this NPRM would seek to constrain broadband providers’ network management practices with government specifying what is allowed and what is prohibited by those who invest in and operate broadband networks. Opinions on what is “reasonable” network management are subjective and evolving rapidly. Would a new policy toward file sharing applications be reasonable to thwart piracy if properly announced?

¹⁰ Cornell Belcher, “Internet Innovations,” Brilliant Corners Research (December 2009).



The FCC's proposed restrictions on network management may be reasonable to the extent they allow broadband providers to address threats posed by spam or viruses. But it is not clear that the rules would allow broadband providers the flexibility necessary to ensure the proper functioning of their networks in all circumstances. Moreover, the vaguely defined contours of the FCC's proposed rules may have a chilling effect on broadband providers, preventing them from taking lawful steps intended to ensure the proper functioning of their networks or, at the very least, having their judgments second-guessed by regulators.

This could be especially problematic in circumstances when broadband providers may need to quickly respond to dynamic and changing network demands. For example, if a flu pandemic or other emergency leaves students at home, Internet usage may spike during the day and threaten the ability of others to use bandwidth for work from home, consistent with the General Accounting Office's warnings about what such a scenario might happen in a 2010 flu pandemic.¹¹ The last thing that the public needs in such a situation is for broadband providers to have to consult with the FCC's "Office of Reasonable Network Management Practices" for daily or even minute-by-minute consultation in order to operate their networks under such conditions. But that would be the illogical result if the FCC's proposed net neutrality rules are adopted.

The NPRM raises a myriad of other difficult questions that would need to be analyzed and resolved before adopting any net neutrality rules – further detracting resources and attention away from the development and implementation of a national broadband strategy: Are standards of reasonableness different for wireless networks as opposed to wireline? How about high-capacity fiber networks as opposed to more constrained DSL? Do we give cable broadband networks running older DOCSIS technologies more latitude to manage their less robust networks as compared to those using DOCSIS 3? If regulations restrict those who invest more in robust networks to a greater extent than those who invest less, won't that deter investment and upgrade? And why wouldn't the FCC's rules apply to dominant operating systems, platforms, APIs, search engines, software and standards?

¹¹ "INFLUENZA PANDEMIC: Key Securities Market Participants Are Making Progress, but Agencies Could Do More to Address Potential Internet Congestion and Encourage Readiness," United States Government Accountability Office (October 2009).



In practice, regulations on the Internet are often outdated before they even take effect, and the proposed NPRM could subject network operators to constant second-guessing (with expensive legal defense and penalties) or result in countless daily requests for regulatory permission to respond to changing circumstances.

V. **There Are More Significant Policy Challenges and Opportunities Demanding FCC Attention and Cooperation with Industry.**

The IIA is eager to proffer solutions that expand broadband availability and increase adoption. There is a lot that can be done on this front and we have identified a number of areas where the Commission should devote additional attention.

Use Universal Service Funds For Broadband

The IIA fully supports the Commission's inquiry into ways the Universal Service Fund can be used to support broadband.¹² The USF should be repurposed and funds should be used to help increase the deployment of broadband infrastructure. Moreover, eligibility for broadband USF support should be based on demography, not geography. The USF program currently rewards inefficiency, provides subsidies to carriers irrespective of the financial needs of the carriers' customers and reflects the state of the telecommunications industry and telecommunications technologies as they existed decades ago. The USF should reflect and be tailored to the needs of the broadband era and promote broadband expansion; it should not continue funding analog technologies and basic telephony.

Increase The Availability Of Wireless Broadband

¹² See, e.g., *Comment Sought On The Role Of The Universal Service Fund And Intercarrier Compensation In The National Broadband Plan*, DA 09-2419 (rel. Nov. 13, 2009) (seeking comment on ways the USF can be used to increase broadband deployment); see also FCC News Release, *FCC Identifies Critical Gaps In Path To Future Universal Broadband* (rel. Nov. 18, 2009) (identifying the USF's lack of support for broadband deployment and adoption as a problem).



Rather than battle over net neutrality, the FCC should lead the effort to expand spectrum availability for commercial use, identifying hundreds more megahertz that can support high-speed Internet services. Likewise, we need to continue to focus on removing regulatory barriers to wireless deployment such as zoning, tower-siting or even limits on spectrum holdings.

Improve Digital Literacy

The FCC should take steps to improve digital literacy, which is one of the recognized keys to expanding broadband adoption. Among other things, the Commission should work with the Secretary of Education to undertake a thorough assessment of the digital literacy needs for the 21st century, determining what skills all students need to leverage broadband, when they need to acquire such skills and how such skills are best taught and learned.

The Secretary of Labor should determine the most effective means for including broadband and computer subsidies in worker retraining and transitional assistance programs, and for incorporating online retraining opportunities into existing programs.

The Secretary of Health and Human Services should set standards for Medicare and Medicaid reimbursement for virtual doctor visits and consultations over high-speed Internet. Congress or State leaders should waive state licensure restrictions presently restricting the inter-state practice of medicine. And the President should issue an executive order requiring every federal agency to provide its employees with personal, portable and private digital health records by 2012.

Make Broadband More Affordable

The Commission should shed a light on all of the various local, state and federal taxes that inflate the cost of high-speed Internet access. We continue to treat telecom like a luxury, tax it like a sin and wonder why the U.S. lags in global broadband rankings.

Encourage New Broadband Deployment and Development

The National Broadband Plan should spur investment in infrastructure by providing tax credits for meaningfully significant upgrades to network capacity.



Like the Research and Development (R&D) tax credit, such credits should be based on improvements over the status quo.

The FCC must encourage investment in new technologies by reducing the regulatory obstacles to deployment of broadband over power lines and higher-speed wireless networks. The National Broadband Plan should include a recommendation that federal investments made in affordable housing will require such properties to be “broadband ready,” and the HUD Secretary should amend federal regulations to classify acquisition of broadband service as an acceptable operating expense for such housing.

Increase Network Security

The FCC should work with Congress to boost federal R&D on networking and information technologies that focus on systems defense, intrusion detection and cyber security. Likewise, Congress should expand FTC enforcement powers and penalties against spammers, fraudsters and malware creators.

VI. Conclusion

The Internet Innovation Alliance applauds the Administration for seeking a coherent set of policies and goals that complement and accelerate the efforts in the marketplace to achieve universal adoption of high-speed broadband Internet access. We are excited to see the recommendations of the Commission’s broadband task force and to help advance its many worthy initiatives.

By working together we are confident that public and private leaders can secure the benefits of universal broadband access for all Americans. We do not believe the rules proposed in the FCC’s NPRM are necessary at this time; rather, they serve as a distraction from the more significant work before us.

It’s paramount that we get broadband right and stay focused on the policies that directly impact infrastructure investment and adoption. We urge the FCC keep a watchful eye, but avoid any significant regulations while we get to work on the National Broadband Plan. The Commission retains the tools and ability to act swiftly if and when threats to the free and open Internet materialize.